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Supreme Court of the United States.

OCTOBER TERM, 1895.—NO. 308.

THE GERMANIA IRON CO., EMIL HARTMAN and RICHMOND D. MALLETT,

Appellants,

vs.

THE UNITED STATES,

Respondent.

Appellants' Brief.

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vs.
THE UNITED STATES,
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STATEMENT.

The appeal is from a decree of the United States Circuit Court of Appeals for the Eighth Circuit, affirming a decree of the Circuit Court for the District of Minnesota cancelling a patent for public lands.

The patent was issued November 20th, 1889, to one Thomas Reed (under whom the appellants claim,) in pursuance of an entry made by him February 23rd, 1889, as a soldier's additional homestead; the entry having been made at the land office at Duluth, Minnesota, and having been duly received and allowed by the local land offi-

cers, by whom final certificate in the usual form was duly issued. (Folios 9 and 10 of printed record.)

No testimony was offered by the United States which as we suppose is claimed by it to have any tendency to impeach the regularity or validity of Reed's entry, or to impair the normal force of the entry as a complete investiture of Reed with an equitable title to the land afterwards described in his patent.

It is, however, shown by the government's testimony, and is indeed an uncontroverted fact, that when the patent issued, there were pending and undetermined in the interior department, certain appeals and motions for review or re-argument, instituted by persons who were claiming this land adversely to Reed in spite of the several decisions which had been rendered in his favor; and that the issuance of the patent at that time, in the face of these pending attempts to reverse the land office decisions already made, was due to the fact that the officers charged with the issuance of patents, inadvertently overlooked the pendency of said appeals and motions for review.

The nature and status of these undetermined appeals and motions for review may be briefly described as follows:

First.—July 21st, 1895, Orille Stram adjusted upon this and other land, a location previously made on unsurveyed public land with Sioux half-breed scrip issued under act of Congress of July 17th, 1854, and said locations were posted in the proper tract books of the office of the Commis-

sioner of the general land office on September 9th, 1885. (Exhibits 1 and 2; folios 43-58 of record.)

The validity of these adjustments was contested by one Fred F. Huntress; and Thomas W. Hyde and Angus McDonald made certain pre-emption claims to portions of the land. Upon appeal to the Secretary of the Interior, he decided, February 18th, 1889, that the scrip locations of Orille Stram were invalid, and should be cancelled; that the pre-emption claims of Hyde and McDonald must be rejected as fraudulent; that the claim of Huntress should not be recognized; and that the land in controversy must be disposed of under the public land laws of the United States applicable thereto. (Bill, folios 8 and 9. Answer, folio 13.)

It was in pursuance of this decision of the Secretary of the Interior declaring the land open to public entry, that, five days later, towit, February 23rd, 1889, Thomas Reed made under the soldiers' additional homestead law, the entry of this land upon which the patent in controversy afterwards issued. (See Bill, folio 9.) Afterwards, on March 13th and 15th, 1889, motions for the review of the said decision of the Secretary of the Interior were made on behalf of the parties adversely affected by it, to-wit, by Stram, Hyde and Huntress; and on May 29th and June 3rd, respectively, of the same year, the attorneys for the parties so moving, notified the commissioner of the general land office of the pendency of such motion for review, and requested that no action should be had looking to the disposal of the lands in question

until final action of the Secretary of the Interior on the motion for review. (Bill, folio 9; stipulation, folio 39; and see folios 101-103 of printed record.)

By force of a general rule of the Department of the Interior, and also by express order of the action commissioner and of the Secretary of the Interior, further action with reference to said lands was thereupon suspended until action should be had upon the motion for a review of the Secretary's decision. (Bill, folio 9; stipulation folio 39; and see folio 103 of printed record.)

The motions for review were still undisposed of when the patent issued, November 20th, 1889.

Second.—On the 23rd of February, 1889, the date of Reed's entry, and the day on which, in pursuance of the decision of the Secretary of the Interior adverse to Stram, Hyde and Huntress, the land in controversy was thrown open to entry, there were several other persons who made application to enter the same land, which applications were, however, rejected by the local land officers, as being subsequent to and in conflict with the entry of Thomas Reed. Folios 68, 80, 93.

Of these competitors for the land, Charles P. Wheeler applied to locate a part with Valentine Scrip, Warren Wing applied to locate another part under section 2306 of the Revised Statutes, and Wm. Stokes applied to enter a part as soldier's additional homestead. (Bill, folio 9; and see Exhibits 4 and 5; folios 60-96 of printed record.)

These several applicants thereupon appealed to

the Commissioner of the General Land Office from the rejection of their respective claims by the local land officers, upon the grounds that their several applications were made simultaneously with or before that of Thomas Reed. (Folios 60, 62, 73, 85, 96 and 97 of printed record.)

These appeals were also undetermined when the patent issued.

Before the institution of this suit, the circumstances attending the premature issuance of the patent were investigated under the authority of the Honorable Secretary of the Interior by a committee of the General Land Office, and the conclusion reached that it was due to pure inadvertence. (See foot of page 39, and pages 98-119 of printed record.) A surrender of the patent was thereupon demanded, and was refused.

The allegation of the bill is that "While said adverse claims were pending in the Department of the Interior, and should have been finally decided before patent should be issued to transfer the legal title to the said Thomas Reed under his entry, the said entry of said Thomas Reed was inadvertently and by mistake approved for patent by a clerk in the office of the Commissioner of the General Land Office, whose duty it was to approve the same for patent, provided a patent should be issued, that the same was approved by the clerk for a patent on the 20th day of November, A. D. 1889, who was then and there ignorant that any of said motions for review had been made, or that any notice had been filed against the issuing of said

patent, and who was in ignorance of the orders of the said Secretary of the Interior and Commissioner of the General Land Office hereinbefore set forth."

Neither in the allegations of the bill nor in the proofs is there any suggestion of bad faith or collusion on the part either of any officer or clerk of the Government, or on the part of those claiming under the patent. The record, therefore, presents a single question, and a pure question of law, to-wit:

Where by decision of the Secretary of the Interior all previous claims upon a particular tract of land have been rejected and cancelled, and the land declared open to public entry; and where, in good faith, an entry thereof has thereupon been made, which has been received and allowed by the local land officers, and upon which a patent has thereupon issued to the entry man; will a court of equity, without proof of irregularity or invalidity in the entry, or of superior equities in any other person, intervene to divest the patentee of his legal title, merely upon the ground that the patent was issued prematurely, or through inadvertent disregard of the fact that there were pending and undetermined certain appeals and motions of review, through which other competitors for the land were seeking to reverse the Land Office decisions, which had already been rendered in faver of the patentee?

This question might have been presented by demurrer to the Bill of Complaint had it not been alleged in the bill (folio 9), that the applications of Wheeler and Wing were made simultaneously

with that of Reed. No attempt was made by the Government to substantiate this allegation by proof, nor is there any testimony having the slightest tendency in any way to reflect upon either the accuracy or the good faith of the local land officers in accepting the application of Reed as the first in the order of time, and in rejecting the other applications as subsequent thereto. The Bill rests squarely and necessarily upon the proposition that irrespective of a patentee's equitable and ultimate right to the land, his patent will be cancelled by a court of equity if it appears that by inadvertence it was issued prematurely, before competing claims to the land had been formally and finally disposed of by the Land Department. The case should not be confused with those in which cancellation has been sought because of unlawfulness in the entry, or because of the superior equities of an adverse claimant.

SPECIFICATION OF ERRORS.

The Court erred:

1 In holding that because the patent to Defendant Reed had been issued through the inadvertent disregard of certain pending and undetermined appeals and motions for review, through which other claimants of the land were seeking in the land department to overrule the decisions which had there been made against them, and in favor of the defendant Reed, it was therefore subject to cancellation upon proof of this

inadvertence or mistake, without any evidence that Reed was not legally entitled to the land, or would not probably have been awarded the same if the appeals and motions for review had been heard, and without proof of ultimate prejudice to any one from the inadvertence or mistake.

2. In the conclusion of law that upon the facts proven the government was entitled to a decree of cancellation.

3. In affirming the decree of the circuit court, and decreeing the cancellation of the Reed patent upon the ground of inadvertence or mistake, in the absence of any testimony indicating that such inadvertence or mistake had been prejudicial to the rights of any one.

APPELLANTS' BRIEF.

Briefly outlined, the considerations which we urge against the cancellation of our patent are:

That the mistake which led to its permature issuance was the mistake of the President of the United States; that the President nevertheless signed the patent knowing the nature of the instrument signed, what land it conveyed and to whom, and on what kind of entry; and that the error, having reference as it did, to a preliminary and collateral circumstance only, was not fundamental, and (as is conceded by the government),

did not impair the force of the patent as a conveyance of the legal title;

That we being the legal owners of the land, ought not by an exercise of the extraordinary powers of a court of equity, to be stripped of our title, without some inquiry whether we are not also its equitable owners, as we claim to be, and as we were found to be by such decisions of the general and local land officers as were made prior to the issuance of the patent.

That the equitable jurisdiction can be invoked for the correction of mistakes only upon proof that substantial prejudice has ensued;

That if we regard this suit as one brought by the government to enforce the property rights or equities of the individuals who in the land department were competing with Reed for the the patent to this land, and whose rights, if any, it may for the purposes of the argument be admitted that the government is under obligation to protect; the fact remains that within the meaning of the rule last above stated, the mere loss by such parties, of a right to a hearing or rehearing in the Interior Department, does not involve or imply substantial or ultimate prejudice, unless it is proven that if such hearings had taken place the former rulings in Reed's favor would probably have been reversed;

That if on the other hand the suit be considered as brought by the government as a vendor of lands, and for the enforcement of its own property rights, it presents the simple case of a vendor seeking to cancel his conveyance, *without denying the vendee's equitable right thereto*, merely

upon the ground that the vendor had inadvertently signed the conveyance on an erroneous assumption that his agents whom he had charged with investigating the right of the vendee to the conveyance had fully completed their inquiries on the subject;

And finally, if it be the theory of the suit, that apart from the property rights of the United States, or of the other competitors for the land, the United States is entitled in its governmental capacity to appeal to a court of equity for the cancellation of the patent in order to vindicate the integrity and regularity of its executive procedure, this we say is contrary to the recognized doctrine of this court, and involves a radical misconception of the sphere of equity jurisdiction.

It was the President's Mistake.

In the courts below contumely was heaped upon our patent upon the theory that it was referable to the error of an inferior clerk. But the error of the clerk had no immediate or legal relation to the issuance of the patent which bears the seal of the Interior Department and the signature of the President, by whom all patents are required to be signed. (Sec. 458, Rev. Stat.) The misapprehension of the clerk is material only as evidence of mistake on the part of the President. Under the statute the identity of the clerk is lost in that of the President, as that of an agent in his principal. It is only "*under the*

direction of the President, in his name, and for him," that by the terms of Sec. 450 of the Revised Statutes patents are authorized to be signed by a secretary.

As a muniment of title the patent is not less solemn, authentic or efficacious than if signed by President in person. To be his act it need not be under his hand.

Williams vs. U. S , 1 How., 290.
Wolsey vs. Chapman, 101 U. S., 755.
Wilcox vs. McConnell, 13 Peters, 498.

Nor is the liability to presidential error increased by the delegation of the manual act of signing, since even though that were personally performed, the data suggesting or forbidding the execution of a patent must still be derived from the clerks and secretaries who were eyes and ears to the President long before the statute made them his hands.

The Patent Invested us with the Legal Title, and, notwithstanding the mistake, is prima facie evidence of our right to the land.

That the patent carried the legal title, is conceded by the government and by the courts below. If it were void, the authority of the department to proceed with its investigations would be unaffected by it, but the theory and allegation of the bill is that "by reason of said mistake in issuance of patent, the Secretary of the Interior is without power to consider the contests which would have been and could now be heard and decided on

their merits if said patent were cancelled," (Fol. 11); and so it was declared by the Court of Appeals (Fol. 137). About this in principle there can be no doubt. The President was dealing with public land open to entry, knew he was conveying the tract in controversy to Thomas Reed, in pursuance of an entry thereof made by Reed under the Act relating to Soldiers' Additional Homesteads, and deliberately intended to do exactly what in fact he did. How at law could it be material that there were additional facts which, if known by him, would have induced him to refrain. The point was directly adjudicated in *Williams vs. U. S., 138 U. S., 514*, at pages 516, 521, where a certification of lands to the State of Colorado was held to have passed the legal title, although done through inadvertent disregard of contests over the title, still pending in the general land office.

It was similarly held in *Widdecombe vs. Childers*, 124 U. S., pp. 464-405; and in U. S. vs. Hughes, 11 How. at pp. 567-568.

So if the patent has issued upon the assumption that there has been certain hearings before the land officers, although by reasons of the fraudulent conspiracy of such officers no such hearings have been had.

> Field, J., in Smelting Co. vs. Kent, 104 U. S. 647.
> Cheever vs. Horner, 11 Col. 68.

"So a mistake even as to the class or character of the lands."

> Chandler vs. Calumet & Hecla Mining Co. 194 U. S. 93

We respectfully claim therefore all the rights of one to whom, in pursuance of a *bona fide* entry,

the chief magistrate of the nation, acting under the authority of law, has conveyed a tract of public land by legally valid letters patent. Such being our status, we are presumptively entitled to the land in spite of the fact that appeals or reargruments. which under the regulations should have been heard in the Interior Department, were lost by inadvertence. This is doubly true:

(1.) The patent itself under the seal of the Interior Department and the hand of the President, is undoubtedly *prima facie* evidence of title in equity as well as at law. even though it should appear that no hearing either in the local land office or in the Department had ever been had between the contestants for the land, whether the failure to have such rehearings were due to the President's wil'ful disregard of the land office regulations or to his mistake.

(2.) If however, it were supposable that the President's patent would not be *prima facie* evidence of title if issued either wilfully or inadvertently without land office investigations, the objection would not reach our patent. As against all the other competitors for the land, the patent is supported, as shown in the foregoing statement of facts, by decisions either of the Secretary of the interior or of the local land office, which the instant they were made, became adjudications in our favor of the facts in controversy, the force of which, not only as *prima facie* evidence, but as an absolute estoppel, remains unbroken to this day. It is true that upon adequate proof of injustice occasioned by the acci-

dental loss of appeals or re-hearings, this court of equity might relieve against the estoppel as it might against any other consequence of mistake. The decision of a court of primary jurisdiction is not affected as an estoppel by an appeal even when accompanied by a supersedeas.

Freeman on Judgments, Sec. 328.

And the cases hereinafter cited abundantly illustrate that the estoppel of such a decision is not impaired by the accidental loss of a new trial or appeal. Such loss may, if productive of injustice, induce equitable intervention and relief, but until such relief is granted the estoppel is unimpaired.

Mistake and Accident are Relievable in Equity only when they have produced unjust results.

Mistake and accident *as such* never furnish a basis for either legal or equitable interference.

Pollock on Contracts, marginal pp. 383, 384.
1 Story's Eq. Jur., Par. 203

As all actions for tort are for the consequences of acts, not for the acts themselves, (Holmes Com. Law, 91), so it is only against the consequences of fraud or accident that the powers of equity can be invoked.

Equity is not interested in mistake as a psychological condition, and is as little concerned in questions of mere procedural or departmental regularity; generally speaking ultimate and sub-

stantial justice is the commodity with which it deals.

The powers exercised by courts of equity are extraordinary and in a sense extra-legal, and have been called into existence only by emergencies involving or threatening actual and substantial injustice. They are powers which therefore have not been, and with propriety could not be employed to compel the observance of mere form or regularity.

Even in a court of law money cannot be recovered, which by reason of such recovery could be immediately recovered back.

Bailey vs Bancker, 3 Hill, 188, 191.

Why then should a court of equity divest us of our legal title, only in order, so far as it appears, that it may be forthwith more formally and regularly returned to us.

Indeed, since upon the testimony we are presumptively entitled to the patent and to the ultimate legal ownership of the land, our case falls squarely within the case of U. S. vs. *Central Pac. R. R. Co.*, 26 Fed. Rep., 479, 482, 483, in which it was held that a court of equity would not indulge in the folly of cancelling a patent, although wrongfully issued at the time, if apparently the cancellation would be followed by the issuance of a new patent to the same parties.

That the courts take cognizance of mistake only for the correction of unjust results, is illustrated by the law with reference to the recovery of money paid by mistake. No matter how fundamental the error, the money cannot be recov-

ered if for any reason the person to whom it has been paid is in good conscience entitled to retain it.

The case of *Badeau vs. United States*, 130 U. S. 439-452, although an action for money had and received, presents some striking analogies to the case at bar. The action was brought by the government to recover from Badeau certain moneys which the court held had by mistake been paid to him in violation of law; and the violation was not in matter of form only, but in substance, the court holding that he was not *legally* entitled to demand or receive the money. It will be observed that property had there escaped from the government in violation of law, as in the case at bar it is alleged to have escaped in violation of the rules and regulations of the Interior Department, with this difference however, that the government does not here claim that we were not ultimately entitled to the land, but merely that we have not received it under the forms and in pursuance of the regulations established by the department. But the court, being of the opinion that although Badeau was not legally entitled to demand the moneys, there were circumstances which rendered it not inconsistent with good conscience that he should be allowed to retain them, held the government's action not maintainable.

So in *Foster vs. Kirby*, 31 Mo. 496, where it was held incumbent upon the plaintiff to show not only that the money paid was not due under the obligation upon which it had been paid, but there

was no other indebtness upon which the defendant might in good conscience be entitled to apply it.

So in *Simpson vs. Swan, 3 Campb. 291*, the recovery of money paid by mistake was refused by Lord Ellenborough, because it appeared that if recovered by plaintiffs the defendant would be entitled to recover it back again in an action for damages for the wrongful sale of property by the plaintiff, as a factor, to an insolvent purchaser.

"A man cannot have relief on the ground of mistake unless the party benefited by the mistake is disentitled, in equity and conscience from retaining the advantage which he has acquired."

Kerr on Fraud and Mistake (Bumps Ed. 1872) 409, and cases cited.

It is not shown that the inadvertence complained of has resulted in such injury to any one, as to justify cancellation in equity.

If there has been such an injury, what is it? Not the loss of the land, for it is not claimed by the Government that any of Reed's competitors had, or ever could have, acquired a right to the land as against the defendant Reed. The alleged injury which those parties are supposed to have suffered consists wholly in the fact that by accident or inadvertence they have lost the right to have certain re-hearings in the department of the interior, which they hoped might result in the reversal of decisions already made against them. Does the accidental loss of this so called right to a rehearing, on appeal or otherwise, evoke the powers of equity for cancellation

without any showing of merits or ultimate rights in the persons supposed to have been aggrieved? It is not the old question whether the government can properly bring the suit for the benefit of individuals. The question is the same as would have arisen in a suit for cancellation in the name of Reed's competitors, if the law were that cancellation could be sought as well in the name of aggrieved individuals as in the name of the government. It is the identical question which has arisen in more than a score of well considered cases, and concerning which, there is a consensus of authority, to wit: whether one, who by inadvertence, accident, mistake or fraud, has been deprived of a right to have his case heard or reheard in a particular tribunal, can induce equity to intervene in his favor, without showing merits or satisfying the court that the case would have probably resulted differently if the lost hearing had been had. For the right to a hearing or rehearing in the land department is certainly no more in the nature of a substantive and ultimate right than is one's right to be heard before being condemned in the ordinary courts of justice, or the right to enjoy in those courts the appeals, new trials or re-arguments in that behalf, contemplated by law or rules of court.

The fatal point of weakness in the case at bar, regarded from this point of view, is that the right of a party to a trial or rehearing is never such an ultimate or substantive right as equity will intervene to protect against fraud or accident

without proof that there has been miscarriage of ultimate justice.

In *Steel vs. Smelting Company*, 106 U. S. 454 it was claimed that the patent had been obtained by fraud and perjury respecting the character of the land and the qualifications and possessions of the entryman.

It was pointed out by Mr. Justice Field in delivering the opinion of the court, that this did not necessarily justify a suit for cancellation. "It does not follow," he said, "that the officers of the government would take such proceedings even if the charges of fraud and of the use of false testimony in obtaining the patent were true. They might be satisfied that the patentee was entitled to the patent upon other testimony, or, that further proceedings would result in a similar conclusion, and that therefore it would be unwise to re-open the matter."

In Davy's Executors vs. Faw 7 Cranch, 171, 174, it was attempted to set aside in equity a report of arbitrators, because there had been apparently by mistake a failure to pass upon one of the matters submitted, upon which the complainant was entitled to a decision. Relief was denied because "complainant was not shown to have been injured by the omission;" which we suppose to mean that for all that appeared, the result of a hearing upon that matter, might have been adverse to the complainant.

Johnson vs. Branch, 48 Arkansas, 595, was an appeal from a decree in equity directing a new trial in an action at law. The motion for a new trial had been lost at law, by the action of the

court's adjourning before it could be heard. It was held that this was an accident against which a court of equity would relieve; but not without proof that the judgment as actually rendered was against conscience. The court say: "The accident alone does not warrant the interference of equity. It grants relief against judgments, in aid of justice, not as a recompense for the accident; and although the law court may have committed an error on the trial, if the judgment is not against conscience, a court of equity will not meddle with it. The accident or some other ground of equitable interposition, and the injustice of the judgment, must concur."

In Valentine vs. Holland, 40 Arkansas, 338, in a similar suit to the foregoing, it is said that in a suit in equity for a new trial at law, on account of accident, the first thing to be shown by plaintiff is, "That his adversary has obtained an advantage that cannot be conscientiously retained; as that a successful plaintiff has no cause of action, or that an unsuccessful defendant had a meritorious defense."

In the similar case of Harkey vs. Tillman, 40 Arkansas, 551, the bill prayed a decree for a new trial, at law, because the motion at law for a new trial had been lost by its having been continued to a day in an adjourned term, which from accident was not held, whereby the judgment became final. The bill was dismissed. It was held that the "action of chancery in such cases cannot be imperatively demanded. It must be moved by some apparent hardship in the circumstances; some failure of justice from accident or mistake.

It will not interfere on mere technical grounds; for although it will interfere with the regular course with any other tribunals upon the said grounds above mentioned, and grant the relief which the particular tribunal from its inflexible rules cannot give, it is rather in aid of justice than for the correction of error. It must appear that substantial injustice, or the failure of justice has occurred; in other words the application must show merit."

So in Lee vs. Armor, 35 Arkansas, 123, the motion at law for a new trial, had been lost by the sickness of the judge, which prevented the hearing of the motion at the term of the trial; after which, it was too late. It was held that equity would relieve, only on a showing of a meritorious defence or cause of action.

In such cases, "it must be shown to be against conscience that the judgment at law should be executed."

Story Eq Jur., Sec. 887.

So in Marine Insurance Company vs. Hodgson, 7 Cranch, 332, the general rule applicable to the subject, is stated by Chief Justice Marshall as follows: "That any fact which clearly proves it to be against conscience to execute a judgment, of which an injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or agent, will justify an application to chancery."

See also Crim vs. Handley, 94 U. S., 657, 658.
Railroad vs. Neal, 1 Woods, C. C. 353.

In Whitehill vs. Butler, 11 S. W., 477, the motion for a new trial had been lost at law by its continuance to an adjourned term which was never held. It was held that in order to secure relief in equity, it was necessary to show not only that the motion for a new trial would have prevailed had it been heard, but that it would have prevailed upon other than technical grounds. The Court say, "We indulge the presumption that the judgment attacked is a fair and correct settlement of the matter in dispute. A judgment at law will not be disturbed, when it does substantial justice between the parties, even when the defendant has been prevented by unavoidable casualty from making his defence."

"It must appear that on re-examination and retrial of the cause, the result would probably be different."

2 Beach's Eq. Jur., Sec. 658, and cases cited.
10 Am. & Eng. Encyc. of Law, 898.
3 Pomeroy's Eq. Jur., Par. 136.
High on Injunctions, Par. 89.
Hartford Ins. Co. vs. Meyer, (Neb.) 46 N. W., 292.
Dunklin vs. Wilson, 64 Ala., 168.
Bradley vs. vs. Richardson, 23 Vt., 720.
Piggott vs. Addicks, 3 Greene, (Ia.) 427.

So held in Sauer vs. City of Kansas, 69 Mo., 46, where a tax judgment had been illegally entered by the city recorder after the expiration of the three days allowed by law, to-wit: more than 30 days, whereby the party had been deprived of his right of appeal.

So, even when a judgment is shown to have been obtained by fraud, it will not be set aside in

equity, without a showing of merits, and proof that an honest trial upon the merits would probably produce a different result.

White vs. Crow, 110 U. S., 183.
Lawson vs. Bettison, 12 Ark., 401.
Ableman vs. Roth, 12 Wis., 90.
Knox County vs. Harshman, 133 U. 152.
Way vs. Lamb, 13 Iowa, 79, 83.
Dawson vs. The Bank, 30 Ga., 664.
Reeves vs. Cooper, 1 Beasley, 223.
Paine vs. Dudley, 1 Wash., 199.
Lee vs. The Ins. Co., 2 Ala., 21.
Nason vs. Smedley, 8 Vt., 118.
2 Lead. Cas. Eq. (4th Ed.), 1369.

In the case of White vs. Crow, *supra*, the bill charged fraud in getting a judgment, by collusion with the resident agent of a non-resident defendant corporation, and prayed for an injunction, etc. Held, that even though fraud were shown, injunction would not issue, unless it were proven that there was a good defence upon the merits.

The Wisconsin case, Ableman vs. Roth, *supra*, is particlarly pointed and well reasoned.

So, even though a Justice of the Peace enters judgment, without jurisdiction, its execution will not be enjoined, in equity, without proof that its enforcement would work injustice.

Stokes vs. Knarr, 11 Wis., 389.

So, the authorities are substantially uniform, that a judgment at law, obtained upon a false return of a service by a sheriff, so that the defendant has had no opportunity whatever to be heard in his defence, will not be set aside or enjoined in equity, without proof of a meritorious defence.

Freeman on Judgments, Sec. 498.

3 Pomeroy's Eq. Jur. Sec. 1364, note 1.
State vs. Hill, 50 Ark.. 458.
Secor vs. Woodward. 8 Ala., 500.
Colson vs. Leitch, 110 Ill., 504.
Gregory vs. Ford, 14 Cal., 138.
Taggart vs. Wood, 20 Ia., 236.
Saunders vs. Britton, 37 Ala., 716.
Fowler vs. Lee, 10 Gill & J., 358.
Harris vs. Givin, 10 Smedes & Marshall, 563.
Gardner vs. Jenkins, 14 Md., 581.
Coon vs. Jones, 10 Ia., 131.
Givin vs. Campbell, 20 Ia., 179.
2 Lead. Cases Eq. (4th Ed.), 1371.

The principle, thus variously illustrated, is manifestly decisive of the case at bar, so far as the same may be supposed to rest upon any theory of injury or injustice to Reed's competitors for the land. For there is nothing in the bill or in the proofs to indicate that the government, or any of its officers, have questioned, or have any reason to question, the accuracy of the department decision by which the land in controversy was awarded to Reed.

Presumably these decisions were advisedly made, and the bill suggests no ground upon which the court could suspect them of error or injustice, or could anticipate that a different result would have been reached had the desired reargument and appeals been heard.

It is not difficult to connect the foregoing line of cases with the general doctrine of equity in cases of fraud and mistake.

This doctrine is, that there must not only be proof of fraud or mistake or accident, but there must be proof that an actual and ultimate injury has been thereby entailed. That of which the

complainant here complains, is that by accident certain claimants of the land in controversy, have, temporarily, been compelled to abide by certain orders and decisions of the land officers, from which, but for the accident, they would have enjoyed a right of appeal. The point to be observed is, that it nowhere appears that such appeals, even if duly entertained and disposed of, would have resulted in any modification of the original decisions. The case is, therefore, directly within the familiar principle adverted to by the Supreme Court in Grymes vs. Sanders, 93 U. S. 60, where it said: "A mistake as to a matter of fact to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely accidental. The court must be satisfied that, but for the mistake, the complainant would not have assumed the obligation, from which he seek to be relieved."

So, here, the court must be satisfied that but for the accident which prevented the hearing of the re-arguments and appeals, the original decisions of the land department would have been modified or reversed. Of this there is no pretense either by allegation or by proof.

It seems hardly worth while to call the court's attention to the broad distinction existing between the foregoing cases and the decisions cited on behalf of the government to show that courts, either of law or of equity, will in any particular matter pending before them, enforce regularity of proceeding, and relieve a party against irregu-

larity in the actually pending proceeding on the part of his adversary, without proof of actual prejudice. If it were otherwise, there would be no motive for an observance of rules or regularity in legal proceedings. In the particular proceeding and in the particular court where irregularities occurs, it is unquestionably *per se* a sufficient ground for correction and relief.

In so far as this action is brought for the benefit or in the interest of other competitors for the land it is to be regarded as accomplishing nothing more than the raising of a controversy between the parties so actually in interest, and is subject to the same rules as though brought by such parties in their own names.

U. S. vs. Beebe, 127 U. S., 342.
Curtner vs. U. S., 149 U. S. 673.

The evidence fails to make a case in favor of the government as a vendor of lands suing for the cancellation of its conveyance.

If an individual were to file his bill alleging that, being the owner of certain lands, of which two different parties claimed the right to a conveyance from him, he had on the suggestion of his agent in charge of the matter given a deed to one of the claimants on the assumption that the rights of the respective claimants had been fully investigated by the agent, whereas in fact no such investigation had been made or completed, and praying for that reason that the deed

be cancelled in order that the complainant might be able to convey the land to the party, if any, who upon full investigation should appear to be entitled thereto, the bill would without hesitation be held demurrable. The prompt answer of the court to such a bill would be *non constat*, but that the party who received the deed was the party entitled to it. Regarding the government as a proprietor, this is precisely the case stated by this bill.

It might be said in the case above supposed that but for the mistaken supposition of the vendor, the deed would not have been delivered *at the time* it was—that on account of the mistake it was prematurely delivered. But could it be argued that such would be a sufficient ground for coming here to set it aside. We submit that the case supposed is a complete *reductio ad absurdum* of the case at bar, so far as the latter rests upon any theory of redressing the property or contractual rights of the complainant. Between that case and this, the only difference is that the investigations here made, or supposed to have been made, by the agents of the vendor, to-wit, by the officers of the land department, are regulated by law, and as between the conflicting claimants of the land, assume the form of a *quasi* judicial proceeding, but this difference is not pertinent to the proposition which we are now discussing, nor is it so claimed by the government.

Upon the public and *quasi* judicial character of the investigations made by its agents, when the government becomes a vendor, only two con-

tentions are based by its learned counsel (1); that the government as a sovereign has therefore the right to invoke the powers of a court of equity in order to vindicate the integrity and enforce the regularity of its executive proceedings, which is the separate and distinct question hereinafter discussed; (2) that contestants for government land have a legal right to the prescribed department hearing, in which right the government may protect them by a suit in equity, which is the separate question already discussed.

In other words, the public character of the agents of the complainant and of their investigations preliminary to the issuance of the patent are only material when we regard the government as suing either as a sovereign to enforce departmental regularity, or as the representative and on behalf of the individuals upon whose rights the patent is supposed to have impinged.

Regarding the government as a vendor, it has been determined by this court over and over again that its rights and remedies are measured by the same principles which are applied to individual vendors seeking cancellation of their deeds upon ground of fraud or mistake.

Thus in U. S. vs. San Jacinto Tin Co., 125 U. S. 285, it is said:

"But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the same general prinples which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit or any of those other practices which are admitted to

justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter."

In U. S. vs. Hughes, 11 How. 568, the court regretted that the suit had not been founded upon a simple bill in equity without attempting to assimilate the proceeding to an information brought by the attorney general on behalf of the crown in England to repeal a patent, remarking that, "In this country the lands of the United States, lying within the States, are held and subject to be sold, (under the authority of congress) as lands held and sold by individual owners, or by ordinary corporations; and similar remedies may be employed by the United States, as owners, that are applicable in cases of others."

It was upon the same principle, and by a resort to the same analogy that in Moore vs. Robbins, 96 U. S. 533, the court denied the right of the Interior Department to control the title to land after the issuance of a patent.

"It would be as reasonable," the court said, "to hold that any private owner of land, who has conveyed it to another, can of his own volition, recall, cancel, or annul the instrument which he has made and delivered."

So in Hughes vs. U. S., 4 Wall, 236, where the cancellation of a patent was held to fall under the common head of equity jurisdiction relating to relief by cancellation, or correction "when deeds or other instruments are executed by mis-

take, or inadvertence of agents, as well as upon false suggestions."

So in the U. S. vs. Iron Silver Mining Co., 128 U. S. 676, referring to such a suit as this, it was said: "The government has the same right to demand a cancellation of the conveyances of the United States when obtained by false and fraudulent representations, as a private individual, when a conveyance of his lands is obtained in like manner. In this respect the United States, as a landed proprietor, stand upon the same footing with the private citizen. The burden of proof in such cases is upon the government."

So in Maxwell land grant case, 121 U. S. 381, the right of the government to relief in such cases was vindicated by the court by resort to the analogies of an individual vendor.

In such cases a court of equity only exercises its ordinary jurisdiction to prevent injustice from a misconstruction of the law or the machinations of fraud.

So in Stimson Land Co. vs. Rawson, 62 Fed. Rep. 429, it was said: "When the government seeks the aid of a court of competent jurisdiction to set aside a patent obtained by fraud, the general principles of equity must be applied. In such a case the government must allege and prove specifically facts sufficient to invalidate the the patent, and the patentee is entitled to protection to the same extent as the holder of a conveyance of title from an individual."

"In all the cases in which patents have been cancelled, the courts have proceeded according to the familiar rules of equity, and the govern-

ment has been required to allege and prove, by clear evidence, fraud, or some other sufficient equitable ground for wresting the property from the party sued."

N. P. R. R. Co. vs. Sanders, 49 Fed 135.

Again, *it is not claimed by the complainant that its property rights have suffered any wrong or injury whatever. By its duly appointed agents, the local land officers at Duluth, the entry of defendant Reed has been duly and deliberately pronounced regular and valid; and the competitive entries of other persons, making applications on the same day, have been similarly declared subsequent and ineffectual. By the decision of the Secretary of the Interior, after full argument, all applications antedating those of Reed are declared fraudulent or void. It is not suggested that there was or is, on the part of the government, any reason to question the accuracy of those conclusions, or any desire to reconsider them, except as the obligation so to do may have been thrust upon it by the appeals and motions for review of adverse claimants.*

It does not appear from the pleadings or testimony whether the government has any knowledge or belief as to the character of those adverse claims. So far as disclosed in this case they may be palpably perjurous and fraudulent. Hence we say it is doubly clear that in its capacity as proprietor or vendor, the government makes no case; first, because the defendant Reed is not shown to have received by reason of the inadvertence, anything more than he was lawfully entitled to, and would ultimately have received even in its absence; secondly, because the

government as proprietor does not claim to have been wronged, or question the title of the patentee. In other words, the bill itself discloses no attempt or desire on the part of the government to make a case in its own right as proprietor. The aid of equity is invoked only for the relief of individuals, or, by the government in its sovereign capacity, for the vindication of the violated rules and regulations of one of its executive departments.

It is suggested on behalf of the government, that in the event of a rehearing, before the department, it might appear that the application of Reed was simultaneous with the applications of some of the other parties named in the bill, and that in this contingency the government would reap a pecuniary benefit, because the land would then be offered for sale to the highest bidder among the several applicants.

It is a sufficient answer to say, that this proposition falls exactly within the scope of the decisions and principles already cited. It is not sufficient to say that it *might* appear that the applications were simultaneous, or to show that the government *might* reap a benefit. It is necessary to show that it would so appear. The competing applications in question were rejected by the local land officers, who were necessarily personally knowing to the facts, as being *subsequent* to and in conflict with, the *prior* application of the Defendant Thomas Reed. (Fols. 63, 80, 93.)

This was a formal determination by the only officers of the government who from the nature

of the case, could have any actual knowledge of the facts, that the applications of the other persons named, were *not* simultaneous with that of Reed, and no attempt has been made to break the force of this decision.

Can the Government, in its sovereign capacity maintain this suit for the purpose of enforcing regularity in the proceedings of the Interior Department?

This entirely novel question was presented by the learned counsel for the complainant in the court below in the following words: "The government is not seeking to settle in this controversy the claim of any one to the land, but only to protect itself in the due administration of the rules and regulations of it's land department."

If in any case it could be shown that an unauthorized departure from such regulations, whether occasioned by accident, fraud or mistake, had resulted in injury to ultimate and substantial rights of individual property, relief could no doubt be secured in equity. In such a case, however, the government would sue, not in its own right or to enforce regularity, or to vindicate its rules, but to avert injustice to individuals whom it might be bound to protect. Whether this is such a suit we have already discussed. The question now in hand is, whether irregularity or the non-observance of established rules in the proceedings of an executive department, when arising from mistake, is *per se*, such an injurious result or effect as

equity will intervene to correct, so that the circumstance that a document or transaction has sprung from executive irregularity is in itself a sufficient ground for invoking the powers of equity for its vacation.

The proposition that such is the law is no less remarkably comprehensive than it is novel, for clearly a regulation of the land office is not in this respect distinguishable from the regulations of any other department, executive office, or judicial tribunal connected with the federal government, whether at the Capitol or elsewhere. Nor is a transaction in which there are conflicting individual claims or interests, in this respect distinguishable from one between the government and a single individual. If the disregard by inadvertence of an official regulation or form of proceeding, is *per se* is a miscarriage worthy of equitable intervention at the suit of the government, it cannot be material whether one or many may be interested in the proceeding.

Courts of equity could be called upon to cancel a certificate of naturalization upon grounds of irregularity, without proof that the holder was not actually qualified to receive it.

Pension money could be recovered from an honest claimant upon the ground that certain regulations of the pension office had not been observed in the examination of his claim, although it were neither alleged nor proven to the court, that his claim to a pension was not well founded. In brief, the courts can be converted into a dumping ground for the irregularities of all the execu-

tive officers of the United States, and the United States Judges made the disciplinarians of all the executive departments.

Considering the portentous possibilities of expansion which lurk in this proposition, is it unreasonable to ask for the citation of a single case in which any sovereignty has ever sought to apply it. There is no such case, nor is there any legal principle from which any such case can ever arise.

It would seem that the court below may have assumed improvidently, that Williams vs. United States, 138 U. S. 514, was such a case.

The case was as follows: One Williams having initiated an entry of certain lands under the desert land act, before his claim had ripened into a title, conveyed it to other parties, who proceeded to expend many thousands of dollars in its improvement.

Williams then abandoned the claim, and after filing a formal relinquishment, procured the State of Nevada to select the same lands under the provisions of an act granting school lands to that State, and to then sell the same to him. This selection was, by the provisions of the act, not effectual until approved by the Secretary of the Interior. Before such approval had been obtained, the grantees of Williams, who had bought and improved the land under his earlier entry, filed objections to the approval of the State selection by the Secretary of the Interior upon the ground that Williams was attempting to perpetrate a fraud upon them. While the matter was still waiting the consideration of the Secretary

of the Interior, the lands were inadvertently certified to the State, without the Secretary having acted upon the matter, the mistake occurring by reason of some one having erased from the books of the department, a memorandum of the pending contest; and the lands were then sold by the State to Williams. To cancel the certification to the State the suit was brought.

In so far as the case decides that equity will, *to avoid injustice*, cancel a land patent which was issued by mistake, just as it will one which has been secured by fraud, it determines that which certainly ought never to have been questioned, and had been already repeatedly determined.

The fact which distinguishes that case from this, and ranks it in line with all the other cases in which patents have been cancelled, is, that the evidence showed to the entire satisfaction of the court, that the inadvertence or mistake which had resulted in the issuance of the patent contrary to the regulations of the department, had also resulted in a "*monstrous injustice.*" See opinion of Mr. Justice Brewer, page 524. It was not the irregularity, but the resulting injustice which elicited the intervention of the court.

The pith of the case lay in the court's holding that the discretion reposed in the Secretary of the Interior by the clause which required his approval of selections by the State, *was of such a character that the Secretary would have been authorized and in duty bound to protect the equities of those claiming under William's desert land entry against the fraud which Willams was attempting to practice upon them.* This was the one new and debatable

point in the case.

The main contention of Williams' attorneys was that the Secretary's discretion was not broad enough to warrant him in rejecting upon such a ground the State selection, and that inasmuch as the land must therefore have ultimately inured to Williams under the State's selection, the premature issuance of the patent through inadvertence was not a sufficient ground for relief.

The court throughout its decision tacitly concedes the soundness of this argument, if it were to be assumed that the lands must ultimately have inured to the State under its selection, and overrules the contention of Williams upon the ground, and only upon the ground, that but for the inadvertence complained of, the land could never have inured to the State if a sound discretion had been exercised by the Secretary.

This case therefore, when properly understood, militates strongly against the government's position here.

Again, as has no doubt occurred to the court, the claim that the government's laudable desire to "protect itself in the due administration of the rules and regulations of its land department" is a sufficient ground for such a suit as this, is by the strongest implication negatived in a long line of this court's decisions.

It will, as we suppose, not be denied that the government is as much entitled to redress when the due administration of its land office jurisdiction is polluted by fraud, as when it is perverted by mistake. If it is a ground for cancellation of a patent, that by inadvertent disregard of regula-

tions the matters involved failed to receive the attention of the department in the manner and under the forms required, or indeed any final consideration at all, it must be equally a ground for cancellation that the apparent disposition of such matters by the department was tainted by fraud. Certainly purity and honesty in land office proceedure is to the government no less an object of solicitude or of legal or equitable right, than is formality and regularity in such procedure. Hence if the miscarriage of such procedure by accidental irregularity is *per se* a ground for equitable relief at the suit of the government, no less is the perversion of such procedure by fraud. How then are we to regard the numerous elaborately argued cases, in which this court has cautiously from time to time marked out the circumstances under which the government may or may not procure in equity the cancellation of a patent obtained by fraud.

It would follow from the position of learned counsel that the government's right to protect itself in the due administration of its land office jurisdiction would entitle it to maintain suit for cancellation in all such cases, even though the government had no other interest or obligation in the premises.

But the contrary has been repeatedly recognized by this court in a line of cases in which the circumstances under which the government is entitled to maintain a suit for the cancellation of a patent has been exhaustively discussed, both at the bar and by the court, and in which it has been declared that such a suit in order to be maintain-

ed by the government must be brought for the protection of the property interests of the government or of individuals whose rights it is under obligation to protect.

The question seems first to have attracted the attention of the court in U. S. vs. Minor, 114 U. S., 239, 244, in which the patent had been secured "by fraudulent misrepresentation of facts which had no existence, on which the grantor relied and had a right to rely." The court said: "The case presented to us by the bill is one of unmitigated fraud and imposition, consummated by means of representations on which alone the sale was made, every one of which was false. The law and the rules governing these pre-emption sales required in every instance the settlement and residence for a given time on the land, the actual cultivation of a part of it, and building a house on it. It required that the claimant should do this with a purpose of acquiring real ownership for himself and not for another nor with a purpose to sell to another. In the case as presented by this bill none of these things were done, though the land officers were made to believe they were done, by the false representations of the defendant. *It was a case where all the requirements of the law were set at nought, evaded and defied by one stupendous falsehood*, which included all the requirements on which the right to secure the land rested."

As to whether the government had sufficient interest in the controversy to enable it to maintain the suit, the court said:

"If by the case as made by the bill, Spence's

claim had covered all the land patented to Minor, it would present the question, whether the United States could bring this suit for Spence's benefit. The government, in that case, would certainly have no interest in the land when recovered, as it must go to Spence without any further compensation. And it may become a grave question in some future case of this character, how far the officers of the government can be permitted, when it has no interest in the property or in the subject of the litigation, to use its name to set aside its own patent, for which it has received full compensation, for the benefit of a rival claimant."

In Mullan vs. U. S., 118 U. S., 271, 276, 278, the departmental machinery was abused or perverted not by the fraud of individuals as the case last cited, but by the illegal and unauthorized act of the Secretary, in certifying to a State, lands which he knew to be coal lands, but which by misconstruction of law he regarded as not mineral. The defendant contended that action could not be maintained by the government, because the bill was filed at the solicitation of a coal company to whom it was argued the lands would accrue in case of cancellation. It seems not to have occurred to the court that the government could maintain the suit in order "to protect itself in the due administration of the law and of the rules and regulations of its land department;" but the suit was held maintainable upon the ground that in fact, in case of cancellation, the lands would be res-

tored to the public domain and be subject to sale by the United States as coal lands.

It may be said that the two cases last cited are distinguishable from ours in this, that in one of those cases it was by the fraud and perjury of individual litigants, and in the other by an official misconstruction of law that the departmental machinery was perverted to unlawful purposes, while here the departmental action was to a certain extent displaced by accident, so that so far as the proposed re-hearings and appeals were concerned, they escaped the consideration of the department.

But in the United States vs. the San Jacinto Tin Co., 125 U. S., 273, the suit for cancellation rested on the charge that "all the officers of the government below the Secretary of the Interior, who had anything to do with the making, considering, confirming or ratifying of this survey, were interested in the claim; that the motive of the fraud was to include within the survey certain lands which were then known to contain mineral ores, believed to be immensely valuable; and that for this purpose the survey was distorted and wrenched from its proper place in order to cover these mineral deposits;" and that all this was done by the fraudulent and collusive action of the various government officials charged with the making, supervision and approval of the survey.

It is manifest that if these charges were true, the legitimate functions of the department were as effectually impaired as by the accidental loss of an appeal or re-argument, and that there was a case, if any such are known to the law, in which

the government might be entitled to maintain the suit "to protect itself in the due administration of the law and of the rules and regulations of its land department." But the possible existence of such a right seems not to have occurred to the court, and in response to elaborate contentions that the United States had no such interest as to entitle it to maintain the suit, because the lands in case of cancellation would inure to the benefit of a third party, the court declared again that "since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that like the private individual it has such an interest in the relief sought as entitles it to move in the matter." And the right to maintain the suit was recognized only because "the bill itself leaves a fair implication that if this patent is set aside the title to the property will revert to the United States, together with the beneficial interest in it."

It will be observed that the lengthy discussions which have been had in these and other cases, as to whether in the particular instance the government had such an interest as to enable it to maintain a suit for cancellation, were a foolish waste of words, if the interest which the government has to prevent the miscarriage of its departmental investigations

through fraud, collusion or mistake, could be held to constitute a cause of action in its favor.

Finally, it seems safe to say that in so far as the Land Department is to be viewed as a special quasi judicial tribunal charged with the hearing and determination of land litigation between individuals, the government in such a case as that at bar is just as much entitled and obligated to bring a suit in equity in its own name to recover for a Land Office litigant an accidently lost appeal or re-argument, as it would be to entertain a similar proceeding in aid of one who has lost by a similar accident an appeal or new trial in the regularly constituted courts of the nation,—and no more.

The government's relation to the two classes of litigation is in this respect one and the same, *except in cases where it is affirmatively shown that the government is under a property or contractual obligation to a land office litigant which it is in honor bound to fulfill, and to the fulfillment of which such a suit is a prerequisite. In other words, while the nation can maintain a suit to cancel an instrument by which it is unlawfully prevented from fulfilling its contracts and equitable obligations as a vendor of lands (obligations of which there is not a pretence here), it can not maintain such a suit as a sovereign, to vindicate the administration of justice in any of its tribunals special or general, whether executive or judicial, against fraud, mistake, accident, ignorance, or any of the other vicissitudes to which governmental machinery may fall a victim.*

The judgment should be reversed, and judgment ordered for the defendants.

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